BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARIA DEL ROCIO RAYO	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,026,546
CARGILL MEAT SOLUTIONS CORPORATIONS	)	
Self-Insured Respondent	)	

ORDER

Claimant appeals the October 22, 2008, Award of Administrative Law Judge Pamela J. Fuller (ALJ). Claimant was awarded benefits for a 10 percent loss of use of the right upper extremity at the level of the shoulder after the ALJ determined that claimant had not suffered an injury to her cervical spine from the accident on February 10, 2005. Additionally, respondent proved that claimant had a preexisting impairment to her right upper extremity of 15 percent, for which respondent was given a credit.

Claimant appeared by her attorney, Chris A. Clements of Wichita, Kansas. Respondent appeared by its attorney, D. Shane Bangerter of Dodge City, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on January 16, 2009.

ISSUE

What is the nature and extent of claimant's injury and disability? Claimant argues that she is entitled to an award not only for injuries suffered to her right upper extremity, but also for injuries suffered to her neck. Thus, claimant would be potentially entitled to a permanent partial whole body general disability under K.S.A. 44-510e rather than being limited to a scheduled injury under K.S.A. 44-510d. Claimant also disputes the determination by the ALJ that claimant had a preexisting impairment which would entitle respondent to an offset pursuant to K.S.A. 44-501(c). Respondent argues that claimant entered into an Agreed Award in 2004 for injuries to both her right upper extremity and her neck and, thus, an offset is appropriate. Additionally, as claimant suffered a 5 percent impairment to the cervical spine for injuries in 2003 and an identical impairment for

the injury suffered in 2005, claimant would not be entitled to an additional functional impairment or work disability at this time, based on the alleged neck injury.

Claimant alleges two separate accidents while working for respondent. In addition to this claim for injuries to claimant's neck and right shoulder, claimant alleges an injury to her low back on November 26, 2004. That injury was determined in a companion case award under Docket No. 1,024,137.

FINDINGS OF FACT

Claimant worked for respondent for three years during which she suffered a series of injuries to her right upper extremity with an agreed accident date of February 10, 2005. Claimant alleges the injuries include not only her right upper extremity, but also her left upper extremity and neck. (Claimant has also alleged injury to her low back, an injury which was determined in a separate award in Docket No. 1,024,137.) Claimant was initially treated by board certified pain management specialist J. Raymundo Villanueva, M.D., inside respondent's plant. Claimant was referred for physical therapy and was ultimately released by Dr. Villanueva to return to work in respondent's plant. After being returned to work at maximum medical improvement (MMI), claimant was involved in a plant tour with respondent's workers compensation manager, Tom Oldfather. During the tour, claimant was accompanied by a union representative. During the tour, the employee is allowed to review jobs and determine whether he or she can perform the work required by the jobs being viewed. Four jobs were identified as being within claimant's restrictions. Claimant was placed on a job called defect picker. At some point, claimant was moved to a job in the laundry room. This job was determined to be outside of claimant's restrictions, so claimant was transferred to another job that was determined to be within claimant's restrictions. This job, called "naval picker," was a job similar to the defect picker job. Mr. Oldfather testified that claimant had chosen both of these jobs during her tour of the plant. Claimant disputes that she picked the naval picker job during the plant tour. The job descriptions of both jobs were provided to Terry Hunsberger, M.D., for his review. Dr. Hunsberger determined that both the defect picker and naval picker jobs were within the restrictions placed on claimant by Dr. Murati, Dr. Villanueva and Dr. Neel. The weights associated with these jobs did not exceed 8 pounds maximum lift. Claimant was restricted by Dr. Villanueva from pushing, pulling, lifting and carrying more than 30 pounds occasional, 20 pounds frequent and 10 pounds constant. Dr. Neel restricted claimant from reaching greater than 18 inches and allowed no over shoulder-height work. Pushing, pulling and carrying were limited to 20 pounds occasional, 12 pounds frequent and 8 pounds constant. Dr. Murati limited claimant to no above shoulder work and limited lifting with each hand to 10 pounds occasional and 5 pounds frequent. He also limited claimant's reach to no more than 18 inches from the body with the right upper extremity.

At some point, claimant learned that respondent was dissatisfied with her job performance. When working these jobs, a worker is given two weeks to qualify. Claimant was unable to qualify on either job. After failing to qualify on the naval picker job, after one week, claimant was brought to the office and advised of the problem. When, after another week, claimant again failed to qualify, claimant was placed on a medical leave of absence without pay. Claimant remained on medical leave of absence for a total of 18 months, after which she was terminated. Claimant's last day of work was August 30, 2005. During the time claimant was placed on these light-duty jobs and while on the leave of absence, she was entitled to file a grievance through the union. She did not. While on the medical leave, claimant did file for and qualify for unemployment. While receiving unemployment, she applied for at least two jobs per week. After her unemployment benefits ran out, claimant no longer looked for work. At her deposition on April 2, 2008, she acknowledged that she had not looked for work either during 2007 or in 2008.

Dr. Villanueva had treated claimant for right upper extremity problems in the past. Claimant suffered a prior series of accidents to her right upper extremity, with an agreed injury date of April 9, 2003, while working for respondent. At that time, Dr. Villanueva rated claimant at 5 percent to the right shoulder, 2 percent for crepitation in the right elbow and 10 percent for right elbow neuropathy. This combined for a 16 percent right upper extremity impairment. These ratings were pursuant to the fourth edition of the AMA *Guides*,[1] and were used when the parties settled this prior upper extremity injury claim in an Agreed Award on August 18, 2004, in Docket No. 1,015,107.

Claimant was referred by her attorney to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an evaluation on April 3, 2007. This was not the first time claimant had been examined by Dr. Murati. Dr. Murati's report of March 16, 2004, was also used as a basis for the August 18, 2004, Agreed Award. At that time, Dr. Murati rated claimant at 10 percent for her right upper extremity for carpal tunnel syndrome and a 4 percent right upper extremity impairment for the loss of range of motion in her right shoulder. He also rated claimant at 5 percent for myofascial pain syndrome affecting the cervical paraspinals. During his more recent examination on April 3, 2007, he found claimant to have right carpal tunnel syndrome, post release; right ulnar cubital tunnel syndrome; right SI joint dysfunction; left carpal tunnel syndrome; low back pain; right shoulder rotator cuff strain; myofascial pain syndrome in the right shoulder girdle and extending into the cervical paraspinals; and right shoulder impingement syndrome. He rated claimant at 10 percent for the right carpal tunnel syndrome, and 10 percent for the right ulnar cubital decompression, for a combined right upper extremity impairment of 19 percent. Dr. Murati also rated claimant at 10 percent for the left carpal tunnel syndrome and 5 percent for the myofascial pain syndrome affecting the cervical paraspinals. All of Dr. Murati's ratings, for the 2004 and 2007 examinations, were pursuant

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

to the fourth edition of the AMA *Guides*.[2] Dr. Murati was the only doctor who examined claimant that found left upper extremity or neck involvement from this accident.

Claimant was referred to Alexander B. Neel, M.D., of Advanced Orthopedics & Sports Medicine, for treatment beginning March 27, 2006, while claimant was on medical leave from respondent's plant. Claimant was diagnosed with right shoulder pain, right cubital tunnel syndrome and right carpal tunnel syndrome. NCT/EMG tests confirmed mild right carpal tunnel syndrome and a mild ulnar nerve lesion at the right elbow. Claimant also displayed positive impingement in the right shoulder. Claimant was treated with injections into the shoulder. Dr. Neel then performed surgery for claimant's carpal tunnel syndrome and cubital tunnel syndrome on August 11, 2006, with resulting improvement. Subacromial decompression and debridement of the right shoulder were discussed, but claimant elected to forgo the right shoulder surgeries. Claimant was found to be at maximum medical improvement (MMI) on February 1, 2007. Dr. Neel rated claimant at 17 percent to the shoulder for loss of range of motion, 5 percent for the resulting carpal tunnel syndrome and 5 percent for the resulting ulnar nerve entrapment at the right elbow, pursuant to the fourth edition of the AMA *Guides.*[3] Claimant's restrictions included no work at or above shoulder level, no reach greater than 18 inches with the right upper extremity, and no push, pull, lift or carry greater than 20 pounds occasional, 12 pounds frequent and 8 pounds constant.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[4]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[5]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

[2] AMA *Guides* (4th ed.).

[3] AMA *Guides* (4th ed.).

[4] K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

[5] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[6]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[7]

Claimant has alleged injuries to her right upper extremity, left upper extremity and neck from this accident. The only doctor finding any involvement with the cervical spine and left upper extremity was Dr. Murati. The ALJ found the opinion of Dr. Neel, the treating physician, to be the most credible in this matter. The Board agrees that claimant suffered injuries to her right upper extremity, but has failed to carry her burden as to any injuries to her left upper extremity or neck or upper back from this accident.

K.S.A. 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[8]

The rating of Dr. Neel, that claimant suffered a 25 percent functional impairment to her right upper extremity, is also found to be the most persuasive by the Board. The decision of the ALJ in that regard is affirmed.

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[6] K.S.A. 44-501(a).

[7] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[8] K.S.A. 44-510e(a).

K.S.A. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[9]

Both Dr. Villanueva and Dr. Murati rated claimant's right upper extremity from the injury in April 2003. Both earlier ratings were pursuant to the fourth edition of the AMA *Guides*[10] and were the basis for the earlier settlement in Docket No. 1,015,107. In reviewing the earlier ratings, the Board finds that claimant did suffer preexisting conditions to her right upper extremity, with right carpal tunnel syndrome, right elbow neuropathy and right shoulder impingement. The ALJ found an average of the 16 percent upper extremity rating of Dr. Villanueva and the 14 percent upper extremity rating of Dr. Murati to be appropriate, with a resulting 15 percent reduction in claimant's upper extremity rating. Again, the Board agrees with the ALJ's analysis and result, and finds that claimant suffered an additional 10 percent functional impairment to her right upper extremity as the result of this accident.

As directed by the Kansas Court of Appeals in the published opinion of *Mitchell,*[11] K.S.A. 44-510d mandates compensating the extremity at the highest level affected. This award will, therefore, be calculated at the level of the shoulder.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant suffered injuries to her right upper extremity as a result of a series of accidents suffered through February 10, 2005. Respondent is granted a reduction in claimant's award pursuant to K.S.A. 44-501(c) resulting in benefits for a 10 percent functional disability to claimant's right upper extremity. In deducting the preexisting impairment, the resulting award is to claimant's right shoulder only. The award will be calculated accordingly.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

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[9] K.S.A. 44-501(c).

[10] AMA *Guides* (4th ed.).

[11] *Mitchell v. Petsmart, Inc.*, ___ Kan. App. 2d ___, 203 P.3d 76 (2009).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Pamela J. Fuller dated October 22, 2008, should be, and is hereby, affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Maria Del Rocio Rayo, and against the respondent, Cargill Meat Solutions Corporations, a qualified self insured, for an accidental injury which occurred through a series of accidents, culminating on February 10, 2005, and based upon an average weekly wage of $468.25.

Claimant is entitled to 22.50 weeks of permanent partial disability compensation at the rate of $312.18 per week in the amount of $7,024.05 for a 10 percent impairment to the right upper extremity at the level of the shoulder.

As of the date of this award the entire amount is due and owing and ordered paid in one lump sum, minus amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of May, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The percentage of permanent impairment for each separate scheduled injury should be calculated separately according to the weeks on the schedule in K.S.A. 44-510d. Claimant is entitled to a separate permanent partial disability award for each scheduled

injury rather than combining the ratings for the forearm (CTS) and arm (elbow) into the ratings for the shoulder, as the majority has done.[12]

Before the Court of Appeals' decision in *Mitchell*, a majority of the Board believed that separate scheduled injuries should be compensated separately. We now have seemingly conflicting opinions from different panels of the Court of Appeals. In the *Mitchell* case, the Court affirmed a 3-to-2 decision of the Board where the then majority of the Board awarded a single scheduled injury award where the separate scheduled injuries to an extremity were combined. But in the *Conrow* case, decided just one week earlier, the Court of Appeals affirmed a decision by the Board where the separate scheduled injuries received separate awards. Here, the majority follows the *Mitchell* case instead of the *Conrow* case because *Mitchell* was a published decision. However, *Mitchell* did not expressly overrule *Conrow*. Rather, in each case the Court of Appeals simply approved the approach that had been followed by the majority of the Board. The undersigned would reconcile these two decisions by the Court of Appeals by interpreting them together to mean that either procedure is acceptable. In fact, the Court in *Mitchell* said "K.S.A. 44-510d **permits** compensation at the highest level of the scheduled injury . . . . (Emphasis added.)" The Court did not say that K.S.A. 44-510d requires that multiple scheduled injuries be combined. Therefore, the majority of the Board need not change just to follow *Mitchell*.

BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge

[12] See *Conrow v. Globe Engineering Co. Inc.*, No. 99,718, unpublished Court of Appeals opinion filed March 13, 2009); *Redd v. Kansas Truck Center*, No. 1,020,892, 2008 WL 4149955 (Kan. WCAB Aug. 27, 2008); and *Wilson v. Brierton Engineering, Inc.*, No. 1,024,659, 2007 WL 2937770 (Kan. WCAB Sept. 28, 2007).